IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

BETTY MARKOWITZ, WALTER MARKOWITZ, and CHARLES MARKOWITZ, on behalf of themselves and their sister, ESTELLE POSNER,

Plaintiff-Petitioners,

- against -

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JONATHAN A. WEISS
Attorney for Petitioners
LEGAL SERVICES FOR THE ELDERLY POOR
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

INDEX

	Page
TABLE OF AUTHORITIES:	
Cases	i
Statutes	iv
Other Authorities	v
DECISIONS OF THE COURTS BELOW .	vi
GROUNDS OF JURISDICTION	vi
QUESTIONS PRESENTED FOR REVIEW .	vi
STATEMENT OF THE CASE	1
REASONS FOR ALLOWANCE OF THE WRIT	6
CONCLUSION	35
APPENDIX	
OPINIONS OF THE COURTS BELOW:	
Order and Judgment of Judge Wyatt dated June 10 and June 19, 1974, Respectively . . .	A1
Order of the Second Circuit dated December 2, 1974 . . .	A7
TEXT OF STATUTES INVOLVED . . .	A10.

TABLE OF AUTHORITIES

CASES:

	Page
Aptheker v. Secretary of State, 378 U.S. 500 (1963)	18
Armstrong v. Manzo, 380 U.S. 545 (1965)	21
Bell v. Hood, 327 U.S. 678 (1946)	7, 11
Berk v. Laird, 429 F.2d 302 (2d Cir. 1970)	13
Bond v. Dentzer, 362 F.Supp. 1373 (N.D. N.Y. 1973)	16, 17
Carlson v. Schlesinger, 364 F. Supp. 626 (D.D.C. 1973)	12
Carter v. Stanton, 405 U.S. 669 (1972)	8, 15
CCCO-Western Region v. Fellows, 359 F.Supp. 644 (N.D. Cal. 1972)	12, 13
Chy Lung v. Freedman, 92 U.S. 275 (1875)	18
Collins v. Bensinger, 374 F. Supp. 273 (N.D. Ill. 1974)	25
Cortright v. Resor, 325 F. Supp. 797 (E.D. N.Y. 1971), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972)	12, 13
Damico v. California, 389 U.S. 416 (1967)	15
Darnell v. Cameron, 348 F.2d 64 (D.C. Cir. 1965)	24

Donaldson v. O'Connor, 42 U.S.L.W. 2577, 73/1843 (5th Cir. April 26, 1974) 25

Douglas v. Jeannette, 319 U.S. 157 (1943) 9

Edwards v. United States, 314 U.S. 116 (1941) 18

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 14

Farmington v. Tokushige, 273 U.S. 284 (1927) 20

Goosby v. Osser, 409 U.S. 512 (1973) 7

Griffin v. School Board, 377 U.S. 218 (1964) 18

Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) 16

In Re Jessie Gene Elmore, 383 F.2d 125 (D.C. Cir. 1967) 24

Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D. R.I. 1972) 25

Johnson v. Harder, 438 F.2d 7 (2d Cir. 1971) 8

Joiner v. Dallas, 488 F.2d 519 (5th Cir. 1974) 9

Kent v. Dulles, 357 U.S. 116 (1958) 18

Kusper v. Pontikes, 414 U.S. 51 (1973) 14

Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972) 14

Martarella v. Kelly, 349 F.Supp. 575 (S.D. N.Y.1972) 24

May v. Anderson, 345 U.S. 528 (1953) 22

McNeese v. Board of Education, 373 U.S. 668 (1963) 8, 15, 17

Meyers v. Nebraska, 262 U.S. 390 (1922) 20

Monroe v. Pape, 365 U.S. 167 (1961) 9, 15

Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973) 25

New York State Association for Retarded Children, Inc., v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973) 24

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 20

Prince v. Massachusetts, 321 U.S. 158 (1944) 22

Ragsdale v. Overhauser, 281 F.2d 942 (D.C. Cir. 1960) 24

Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E. 2d 581 (1950) 28

Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) 24

Shapiro v. Thompson, 394 U.S. 618 (1969) 18

Stammer v. University of State of New York, 287 N.Y. 359, 39 N.E. 2d 913 (1942) 28

Stanley v. Illinois, 405 U.S. 645 (1972) 21

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) 11

United States v. Guest, 383 U.S. 745 (1965) 18

West Virginia v. Barnette, 319 U.S. 624 (1942) 20

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 9, 16

Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971) 25

Yoder v. Wisconsin, 402 U.S. 994 (1972) 20, 21

Zemmel v. Rusk, 381 U.S. 1 (1965) 18

UNITED STATES CONSTITUTION

Fourteenth Amendment 27

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. §1331 [Text p. A10] 4, 10, 17

28 U.S.C. §1343(3) [Text p. A10] 4, 6-9, 17

42 U.S.C. §426 [Text p. A11] 34

42 U.S.C. §1395(c) [Text p. A18] 34

42 U.S.C. §1395(v) [Text p. A18] 34

42 U.S.C. §1396a(a)(1)	[A24]	9, 16, 31
42 U.S.C. §1396a(a)(5)	[A24]	9, 16, 31
42 U.S.C. §1396a(a)(8)	[A25]	9, 16, 31
42 U.S.C. §1983	[A25]	14, 15, 16
45 C.F.R. §249.11	[A26]	19

NEW YORK STATE STATUTES AND REGULATIONS

Social Services Law §62.5(d)	[A27]	30
Social Services Law §363	[A28]	31
Social Services Law §366-a(4)	[A29]	28
18 N.Y.C.R.R. §358.3(c)	[A29]	32
18 N.Y.C.R.R. §358.5(a)	[A29]	32
18 N.Y.C.R.R. §358.5(b)	[A30]	32
18 N.Y.C.R.R. §358.15(b)	[A30]	33

OTHER AUTHORITIES

Cahn, Child Welfare - Trends and Directions	22
41 Child Welfare 459 (1962)	22
57 Georgetown Law Journal	25
Kestenberg: Separation from Parents: J. Nervous Child, 20 (1943)	22
67 U. Chi. L. Rev. No. 4	25

Decisions of the Courts Below

The opinion of the District Court for the Southern District of New York is unreported. The decision of the Court of Appeals for the Second Circuit is also unreported. Both the opinion of the District Ccurt and the decision of the Court of Appeals are reproduced in the Appendix.

Grounds of Jurisdiction

1. The decision of the Court of Appeals affirming the dismissal of this action by the District Court was dated and entered on December 2, 1974.

2. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

In a case in which a family sought medical assistance to which the suffering woman was statutorily entitled in order to help her and reunite the family, but the assistance was wrongfully refused on

the grounds of the county of application and the parties filling out forms:

1. Did the Court of Appeals act properly in affirming the District Court decision which dismissed the action seeking to protect the constitutional and statutory rights, for lack of subject matter jurisdiction under 28 U.S.C. §1331, even though several substantial federal and constitutional rights (e.g., travel, association, health) were invoked?

2. Did the Court of Appeals act properly in affirming the District Court decision which dismissed the action for lack of subject matter jursidiction under 28 U.S.C. §1343(3) when substantial federal and constitutional rights were involved?

STATEMENT OF THE CASE

The instant lawsuit developed from the following facts: Estelle Posner (plaintiff-petitioner), who suffers from hardening of the arteries, has been a resident of the Masonic Home in Utica, New York, from August, 1971, to the present date. The Masonic Home in Utica is licensed by the State Department of Social Services as a Senior Citizen Health Facility (a category of intermediate care facility), which provides only custodial care. It is not a nursing home or hospital. The arrangements regarding the placement of petitioner Posner in the Masonic Home were handled by the petitioner's husband. It was understood by the petitioner at the time of her placement in the Masonic Home that she would receive necessary medical treatment for her condition. However, from August, 1971, until the present date, the petitioner has never received medical treatment, and her condition has greatly deteriorated.

Application for Medicaid was made

on petitioner Posner's behalf, by her brothers, petitioners Walter and Charles Markowitz, to the Oneida County Department of Social Services in Utica, New York, on March 7, 1973, as she is physically incapable of filling out the forms due to her present condition. There is no question of her financial and physical eligibility. Provision of Medicaid benefits to the petitioner would enable her to return to New York City, where she could receive proper medical treatment at hospitals known and selected for treatment, and be reunited with her family. On April 18, 1973, the Oneida County Department of Social Services denied petitioner Posner's application. A hearing was requested, and it was held, on petitioner's behalf, on November 1, 1973 (after the minutes of a previous hearing on the denial had been lost by the Welfare Department). On December 17, 1973, an adverse decision was rendered by the respondent based on the grounds that the petitioner's husband was the only person qualified to make

the application on her behalf, that the petitioner's full needs were being met in the Masonic Home, and that Oneida County was not the public welfare district responsible for providing medical assistance to the petitioner in spite of regulations cited at the hearing to the opposite effect.

During the period that petitioner Posner has been confined in the Masonic Home in Utica, her brothers, petitioners Walter and Charles Markowitz, and her mother, petitioner Betty Markowitz, have visted her regularly, approximately every other week. These trips from New YOrk to Utica, a distance of over 200 miles, were made at great expense and inconvenience to petitioners Walter, Charles, and Betty Markowitz. On the other hand, petitioner Posner's husband has neither visited nor seen the petitioner at the Masonic Home. Petitioner Posner's mental and physical health have greatly deteriorated during the period of her confinement in the Masonic Home. At present, she is unable to communicate

effectively or to do simple physical acts such as writing her name.

On May 6, 1974, the petitioners commenced this action in the United States District Court for the Southern District of New York against Abe Lavine, the Commissioner of the New York State Department of Social Services, challenging the latter's denial of petitioner Posner's application for medical assistance on the grounds that the denial violated petitioner Posner's constitutionally guaranteed rights to treatment, travel, due process and family association; that the denial violated petitioners Walter and Charles Markowitz's constitutionally guaranteed rights of family association and due process; and that the denial violated petitioner Betty Markowitz's constitutionally guaranteed rights of family association and parentage. The bases for federal jurisdiction in the District Court were 28 U.S.C. §1331, 1343(3). Additionally, the petitioners claimed that

the denial of medical assistance to petitioner Posner clearly violated federal and state statutes and regulations that the restriction of person and location of application was a clear violation of state and federal laws and regulations. The petitioner sought declaratory and injunctive relief, and damages.

On May 14, 1974, the petitioners moved for a preliminary injunction. On June 10, 1974, Judge Inzer B. Wyatt denied this motion and on his own motion dismissed this action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted.

Thereafter, petitioners' timely appealed the District Court's decision to the Court of Appeals for the Second Circuit. On December 2, 1974, the Court of Appeals affirmed the District Court's determination without opinion.

REASONS FOR ALLOWANCE OF THE WRIT

1. The District Court had to Take Jurisdiction of this Case Under 28 U.S.C. §1343(3).

The District Court stated "there is no jurisdiction under 28 U.S.C. 1343(3) because no substantial constitutional claim is advanced" [emphasis added] (Appendix). This case, however, involves two sets of plaintiffs with a plethora of constitutional claims. Estelle Posner is being deprived of her freedom to travel and her right to treatment; her family, their familial and associational rights (and her mother, in addition, her parental rights). The state, on the other hand, has violated, not only constitutional rights, but also federal statutes which also predicate jurisdiction.

This Court has insisted on District Court jurisdiction in every case like this. This Court has laid down the principle with statements such as:

'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 U.S., at 33; 'wholly insubstantial,' ibid.;'obviously frivolous,' Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for thepurposes of 28 U.S.C. §2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' Ex parte Poresky, supra, at 32, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288; see also Levering & Garriques Co. v. Morrin, 289 U.S. 103, 105-106 (1933); McGilvra v. Ross, 215 U.S. 70, 80 (1909).' Goosby v. Osser, 409 U.S. 512, 518 (1973).

This Court has further said:

Jurisdiction...is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually re-

> cover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want or jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682 (citations omitted).

In Johnson v. Harder, 438 F.2d 7, 12 (2d Cir. 1971), the Second Circuit Court of Appeals itself found jurisdiction under §1343(3) "so long as a colorable constitutional claim" had been raised. Here, several constitutional and federal claims have been advanced. All of them have received substantial recognition in other cases. Therefore, the Federal District Court is the appropriate forum. See Carter v. Stanton, 405 U.S. 669 (1972); NcNeese v.

Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

> For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra, 365 U.S., at 171-187, 81 S. Ct., at 475-484. Such claims are entitled to be adjudicated in the federal courts. McNeese, supra, at 674.

In the case at bar, the constitutional questions are central and clear - and if the agency followed the law, the rights would be protected. Therefore, jurisdiction clearly obtains under 28 U.S.C. §1343(3) and the District Court must act to protect those rights. Douglas v. Jeannette, 319 U.S. 157 (1943); Wisconsin v. Constantineau, 400 U.S. 433 (1971) Joiner v. Dallas, 488 F.2d 519 (5th Cir. 1974).

2. The District Court Had Jurisdiction Of this Case Under 28 U.S.C. §1331.

The respondent has, by denying medical assistance to petitioner Posner, violated 42 U.S.C. §1396a(a)(8), that provision of Title XIX of the Social Security Act which provides that assistance shall be furnished with reasonable promptness to all eligible individuals. By ruling that New York City rather than Oneida County was the public welfare district responsible for petitioner Posner's care, the respondent has also misinterpreted the scope of the mandate of 42 U.S.C. 1396a(a)(1) and 42 U.S.C. §1396a(a)(5), which provide that a state plan for medical assistance must be in effect in all political subdivisions of the state and that the plan must be administered by a single state agency. These violations of the petitioners' federal constitutional and statutory rights clearly provide the District Court with jurisdiction of this case pursuant to 28 U.S.C. §1331.

The federal question jurisdictional test was definitively stated in Bell v. Hood, 327 U.S. 678, 682 (1946). The Court held that where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or laws of the United States, and the jurisdictional amount is present, the court must entertain the suit, except: (a) where the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous. Obviously, neither of these two exceptions apply. The rationale of that case indicated that wherever possible, federal jurisdiction should be found to protect federal rights.

The $10,000 jurisdictional requirement of $1331 is met in this case. In the first place, dismissal for lack of jurisdiction is inappropriate unless it appears to a legal certainty that less than $10,000 is at issue. St. Paul Mercury Indemnity Co.

v. Red Cab Co., 303 U.S. 283, 289 (1938).

Petitioner Posner is applying for medical assistance. In this era of medical costs, treatment of hardening of the arteries, and the treatment now necessary to attempt to restore her from the state to which she has deteriorated, may exceed the $10,000 limit in a matter of months.

But notonly will costs consume the amount, but also where fundamental constitutional rights are involved, as in the present case, those rights are "almost by definition, worth more than $10,000." CCCO - Western Region v. Fellows, 359 F. Supp. 644, 647 (N.D. Cal. 1972). See also Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y. 1971), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). Also, the courts, in determining whether $10,000 is at stake, must consider the potential ramifications, both direct and indirect, to plaintiffs. See, generally, Carlson v. Schlesinger, 364 F.

Supp. 626 (D.D.C. 1973), concerning blight of military records, effect on future employment, arrest and detention; and Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970), concerning effect on future earning capacity.

Petitioner Posner is being deprived of her right to medical treatment. This deprivation has caused serious deterioration of both her physical and mental health and will continue to do so. She and the other petitioners are also being deprived by the respondent's decision of their right as a family to be together, a fundamental constitutional right which is "almost by definition, worth more than $10,000." See CCCO - Western Region v. Fellows and Cortright v. Resor, supra.

3. The Abstention Doctrine Does Not Apply To this Case.

Judge Wyatt stated, "Moreover there has been no exhaustion of State administrative and judicial remedies" (Appendix) and even suggested another "fair" hearing as available inNew York City. But, this Court has consistenly held that abstention is a judge-made doctrine that sanctions escape from immediate decision only in narrowly, limited special circumstances, justifying the delay and expense to which application of the abstention doctrine inevitably gives rise. Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509 (1972); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 418 (1964).

In particular, suits brought pursuant to 42 U.S.C. §1983, do not require exhaustion of state adminstrative remedies. The Supreme Court has stated that "relief under the Civil Rights Act may not be defeated

because relief was not first sought under state law which provided a remedy." McNeese v. Board of Education, supra, at 671. See also Carter v. Stanton, supra, at 671; Damico v. California, 389 U.S. 416, 417 (1967)(§1983 suits require no exhaustion and can be brought even after a state suit on the same question has been filed). Monroe v. Pape, supra, at 183: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[1/]

[1/] It should be noted in passing that to request another fair hearing, as the court below suggests, would be futile because the appellee has already ruled that appellant Posner's full needs are being met in the Masonic Home and that her brothers lack standing to request a hearing on her behalf. Apart from being futile, the resort to further state administrative procedures would naturally involve great expense and delay, while petitioner Posner's health continues to deteriorate.

The present case deals primarily with the interpretation of a federal statute, 42 U.S.C. 1396 et seq., and the denial of federal constitutional rights. The state law issues here are clear, secondary and pendent. In actions brought pursuant to 42 U.S.C. §1983, as this one is, there is a special duty upon federal courts to exercise their jurisdiction because abstention is least appropriate where federal civil rights are in jeopardy. Holmes v. New York City Housing Authority, 398 F.2d 262, 265-266 (2d Cir. 1968); Bond v. Dentzer, 362 F. Supp. 1373, 1381 (N.D. N.Y. 1973). (Also, this Court noted in Wisconsin v. Constantineau, supra, that where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.)

The fact that appellant Posner had an Article 78 action similar to the present one pending in the New York County Supreme

Court is not relevant so far as the absentiion issue is concerned. It was brought and specifically so labeled to prevent an expiration of the Statute of Limitations should it occur that that proceeding was the only available remedy left. Where jurisdiction is proper in both state and federal courts, it is the duty of both to address the complaint. McNeese v. Board of Education, supra, at 672; Bond v. Dentzer, supra,at 1381.

Therefore, because of the substantial federal and constitutional claims involved and the clarity of the state law, jurisdiction under 28 U.S.C. §1343 and §1331 lies and abstention does not apply.

4. The Respondent Has Denied Petitioner Posner her Constitutionally Protected Right to Travel which should be Protected by Federal Courts.

The right to travel is constitutionally protected, United States v. Guest, 383 U.S. 745 (1956). The case that clearly prohibited denial of benefits to people who choose to travel is Shapiro v. Thompson, 394 U.S. 618 (1969). See also Apthecker v. Secretary of State, 378 U.S. 500 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Kent v. Dulles, 357 U.S. 116 (1958); Zemmel v. Rusk, 381 U.S. 1 (1965); Edwards v. United States, 314 U.S. 116 (1941); Chy Lung v. Freedman, 92 U.S. 275 (1875). Yet, petitioner Posner was denied medical benefits because she traveled to reside in Utica and applied there; yet petitioner Posner was denied medical benefits because she wants to use them to leave the Masonic Home and travel to New York City, and their absence prevents her from doing

so. The wrong is twofold: she is denied because of where she applied and the denial chains her to a warehouse rather than providing treatment where appropriate. Such denial, to punish and prevent travel, is clearly prohibited by the cases cited.

To deny medial benefits because of travel to and, in order to prevent travel from, the Masonic Home is, therefore, unconstitutional. The applicable statutory authority, §249.11 of Title 45 of the Code of Federal Regulations, provides for free choice of medical providers. Thus, the state cannot insist, as they have here, that petitioner Posner not move but stay to "utilize" the Masonic Home (which affords no treatment).

5. The Respondent has Denied the Petitioners Their Constitutionally Protected Right To be Together as a Family.

The fundamental right to maintain the family unit has long been recognized in American Constitutional Law. See Meyers v. Nebraska, 262 U.S. 390 (1922); West Virginia v. Barnette, 319 U.S. 624 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Farmington v. Tokushige, 273 U.S. 284 (1927). More recently, in Yoder v. Wisconsin, 402 U.S. 994 (1972), the Supreme Court made it clear that the value of a family unit is so strong that it can even take precedence over State statutory requirements. In that case, Amish children were not required to go to school because of their parents' religious precepts, in spite of the requirements of the Public Education Law.

In the present case, the appellants want to be reunited in New York City, and medical assistance for petitioner Posner is necessary for that purpose. As

there is no law preventing the family unit from staying intact as there was in Yoder v. Wisconsin, supra, (where the Public Education Law ordered the children out of the home and into the schools) a fortiori, the Constitution also compels that this family not be rendered and maintained asunder, against all their wishes. See also, for procedural safeguards reflecting the constitutional sanctity of the family unit, Armstrong v. Manzo, 380 U.S. 545 (1965), and Stanley v. Illinois, 405 U.S. 645 (1972). Petitioner Posner wants to be back with her mother and brothers. The mother and brothers wan petitioner Posner in New York City receiving medical treatment and living with them. Medical assistance is necessary and required by the Constitution for this purpose.

6. Petitioner Mrs. Markowtiz has a Constitutional Right to have Her Child with Her.

Parental rights are "far more precious than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). See also dicta in Prince v. Massachusetts, 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child resides first in the parents." See also Kestenberg: Separation from Parents: J. Nervous Child, 20 (1943); Cahn, Child Welfare - Trends and Directions; 41 Child Welfare 459 (1962). See, in general, the cases cited in No. 5, supra. Mrs. Markowitz, mother of petitioner Posner, is a woman of advanced years. She visits her daughter regularly. At least one of Mrs. Markowitz's two sons travels with her to Utica, New York. The physical effects of the travel are devastating to Mrs. Markowitz. Petitioner Posner, due to lack of medical treatment, has degenerated to

where she is, in practical and physical nature, a helpless infant. Prevented from seeing her child properly cared for, the mother now wants to have her child returned to her in New York, with the hope of obtaining the required medical treatment. The wrongfully denied medical assistance prevents that return, reuniting, and treatment of her child; yet, the Constitution and the above cases affirm Mrs. Markowitz's right to have her child returned to her and receive the treatment to which she is entitled under medical assistance statutes.

7. The Respondent has Denied Petitioner Posner her Constitutionally Protected Right to Treatment Which Should be Protected by Federal Courts.

The right to treatment has been established in District of Columbia, New York State, and other jurisdictions. The two leading cases which so establish this right are Martarella v. Kelly, 394 F. Supp. 575 (S.D. N.Y. 1972) and New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

The right to treatment was first developed in the District of Columbia, and has been expanded and fleshed out in the following cases: the seminal case, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Ragsdale v. Overhauser, 281 F.2d 942 (D.C. Cir. 1960); Darnell v. Cameron, 348 F.2d 64 (.D.C. Cir. 1965). The right was extended to juveniles in In Re Jessie Gene Elmore, 383 F.2d 125 (D.C. Cir. 1967).

Other jurisdictions besides New York

and the District of Columbia have recognized the right to treatment. See, for example, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D. R.I. 1972); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973); Collins v. Bensinger, 374 F. Supp. 273 (N.D. Ill. 1974); Donaldson v. O'Connor, 42 U.S.L.W. 2577, 73/1843 (5th Cir. April 26, 1974). See footnote 12 of Donaldson v. O'Connor, supra, for a summary of the scholarly literature on the right to treatment, including the Symposiums in 57 Georgetown Law Journal and in 67 U. Chi. L. Rev. No. 4.

Petitioner Posner's condition has deteriorated. She is not presently receiving treatment, nor did she ever receive treatment to prevent this deterioration. Petitioner Posner has a right to treatment, as the above cases held. To deny her medical assistance prevents her from receiving this treatment. She must receive her required

treatment, and medical assistance must be provided to enable her to do so.

8. The Respondent has Denied Petitioner Posner her Constitutionally Protected Right to Due Process of Law.

By holding that her family could not speak, apply, or appeal for her, the totally incapacitated Petitioner is prevented from having her entitlement ever adjudicated. placed in a ward that led to a deterioration so she cannot speak up for her rights, the state now holds no one can try to get those rights for her. Once reduced to incapacity, the state prevents her chance to recover. Such a position clearly violates her rights to due process. It also, of course, as discussed infra, violates the applicable statutes and as such violates due process.

Further, by deciding that Petitioner Posner's medical needs were being met in the Masonic Home in the absence of any evidence in the record of the "fair" hearing to that effect, respondent Lavine violated the due process clause of the Fourteenth Amendment.

It is clearly established that an administrative decision for which a hearing is a prerequisite must be supported by some evidence in the record in order to satisfy the requirements of due process. Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E.2d 581 (1950); Stamper v. University of State of New York, 287 N.Y. 359, 39 N.E.2d 913 (1942). The "fair" hearing conducted in the present case was mandated by §366-a(4) of the New York Social Services Law at the request of the petitioners. Upon such request, the respondent was obliged to conduct the hearing and observe due process requirements in so doing.

No only was there no evidence in the record of the hearing to the effect that petitioner Posner's full medical needs were being met in the Masonic Home, but it was impossible for such evidence to have been introduced because no representative of the Oneida County Department of Social Services, which denied the application for medical assistance originally, was

present at the hearing. Yet, such data was essential for the determination. This unsupported decision constitutes a denial of due process.

9. Federal and State Statutes and State Regulations Require that Petitioner Posner be given Medical Assistance.

Respondent Lavine violated state and federal statutes in determining that New York City rather than Oneida County is the public welfare district responsible for petitioner Posner's care. At the time of petitioner Posner's application to the Oneida County Department of Social Services for medical assistance, §62.5(d) of the Social Services Law Provided:

> When a person, either upon admission to a hospital or nursing home located in a public welfare district other than the district in which he was then residing, or while in such hospital or nursing home, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital or nursing home shall be responsible for providing such medical assistance for so long as such person is eligible therefor.

Because petitioner Posner was in the Masonic Home, which is not licensed by the

State of New York as a hospital or nursing home, at the time of her application to the Oneida County Department of Social Services, Oneida County was and is responsible for providing medical assistance to her.

Title XIX of the Social Security Law, 42 U.S.C. §1396 et seq., provides that a state plan for medical assistance must be in effect in all politcal subdivisions of the state and that the plan must be administered by a single state agency. 42 U.S.C. §§1396a(a)(1), (5). The New York State Social Services Law §363 provides that:

> ...a comprehensive program of medical assistance for needy persons is hereby established to operate in a manner which will assure a uniform high standard of medical assistance throughout the state. In carrying out this program, every effort shall be made to promote maximum public awareness of the availability of, and procedure for obtaining such assistance, and to facilitate the application for and the provision of such medical assistance.

Such statutes indicate the state-wide nature of the medical assistance plan and its remedial nature. For both of these reasons, it is irrelevant for purposes of eligibility inwhich county petitioner Posner applied for medical assistance.

In denying petitioner Posner's brothers standing to request a fair hearing on her behalf, the respondent violated the Regulations of the Department of Social Services. Section 358.3(c) of the Regulations provides that any applicant may be represented by legal counsel or by a relative, friend or other spokesman. Section 358.5(a) of the Regulations provides that:

> Any clear written or oral communication to the department by or on behalf of an applicant...requesting review of a social services official's decision, action, or failure to act shall constitute a request for a fair hearing...[emphasis added]

Section 358.5(b) states the policy of the department that the freedom to make such a request must not be limited to or inter-

fered with in any way, and the emphasis must be on helping the appellant to submit and process his request and to prepare his case. Furthermore, §358.15(b) states: "An individual or organization... representing an appellant shall have an appropriate written authorization, unless the condition of the appellant makes it impracticable for him to execute such authorization." Petitioner Posner's physical and mental condition made it impossible for her to request the fair hearing herself or to authorize in writing her brothers to make the request on her behalf. While her brothers and aged mother have exhibited great care and concern for her during the period of her confinement in Utica, traveling from New York City to Utica, at great expense, almost every other week for approximately three years, petitioner Posner's husband has shown little or no concern for her during the period of her confinement. He has rarely, if ever, visited her, and con-

tributes no money directly to her support.

Thus, it is clear that petitioner Posner's application was appropriately made by her brothers and that she is entitled to medical assistance. All eligible individuals must be enrolled and receive benefits with reasonable promptness. 42 U.S.C. §§426, 1395(c),(v) and in particular 1396a(a)(8). No one doubts, nor has it been contended, but that appellant Posner is financially eligible and without assets. Petitioner Posner should receive her entitlement immediately.

CONCLUSION

For all these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JONATHAN A. WEISS, Esq.
Attorney for Petitioners
Legal Services for the
Elderly Poor
2095 Broadway, Room 304
New York, New York 10023
(212) 595-1340

APPENDIX

BETTY MARKOWITZ, on behalf of herself and her daughter ESTELLE POSNER and WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER, Plaintiffs,

-v-

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, Defendant.

74 Civ. 1963

MEMORANDUM OPINION

This is a motion by plaintiffs for a mandatory preliminary injunction directing the defendant, Commissioner of Social Services of New York (Social Services Law ("SSL") §11), to provide Estelle Posner ("Estelle") "with medical assistance payments as provided by law". Movants cite Fed. R. Civ. P. 65.

Medical assistance for needy person is provided for in the New York SSL at Section 363 and following.

Plaintiffs are the two brother (Walter and Charles) of Estelle, who is married, and the mother (Betty) of Estelle. Whether Estelle is herself a plaintiff is uncertain; the action is in the caption said to be brought on her behalf but in the complaint she is said to be a plaintiff. A medical report dated August 31, 1973, states that Estelle is "mentally and physically incompetent" but no committee, guardian or other representative has been appointed.

In August 1971, her husband Maxwell placed Estelle in the Masonic Home at

Utica, New York. She and he had been residents of New York City. He continues to reside in the City and she has resided at the Home in Utica since August 1971.

The status of the Home under SSL is uncertain. It is proably an "intermediate care facility" (SSL § 2(28)); movants say it is a "Senior Citizen Health Facility" but no such definition has been found in SSL; it may be part of the licensing program of the State Department of Health.

On March 7, 1973, the two brothers applied for medical assistance for Estelle to the ONeida County authorities (Utica is in Oneida County). This application was denied on April 18, 1973, on the ground that she did not need medical assistance because the Home was providing it. The application may also have been denied because made to the wrong "public welfare district".

SSL § 62(5)(d) seems to put the responsibility for medical assistance on the public welfare district in which a person resides and to continue that responsibility after such person has been admitted to a hospital or other care facility located in another public welfare district. Thus, the State officials have ruled that an application by Estelle for medical assistance must be made in New York City, rather than in Oneida County.

The two brothers asked for a fair hearing which was held on November 1, 1973, after which there was a decision on December 17, 1973, by the Commissioner. This decision denied any medical assistance on the ground that there had been no application in the New York City public welfare district and that Oneida County was not obligated under Section 62(5)(d) to supply assistance.

Apparently some action was ten filed in the State Courts but what and where it was has not been disclosed.

This action in this Court was commenced on May 6, 1974, and the present motion followed.

It seems evident that this is no matter for the federal courts. This is a State administrative controversy over medical assistance. For this Court to intervene would invite the management by this Court of the New York medical assistance program - an intolerable situation.

There is no general federal question jurisdiction. 29 U.S.C. § 1331. The State has denied no federally protected rights. Its administrative remedies are available. One fair hearing has already been held and another is available in New York City. If, as movants suggest, the State officials are wrong about the county responsible in which application should be made, there is a readily available procedure in the State courts to correct the error. CPLR, Article 78. See Corr v. Westchester County, etc., 33 N.Y. 2d 111, 350 N.Y.S.2d 401 (1973). Moreover, it seems evident that the jurisdictional amount is not present.

There is no jurisdiction under 28 U.S.C. § 1343(3) because no substantial constitutional claim is advanced. Glover v. McMurray, 487 F.2d 403, 407 (2d Cir. 1973). Moreover, there has been no exhaustion of State administrative and judicial remedies. Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969).

28 U.S.C. § 1337 cannot apply because the action has nothing to do with commerce and anti-trust regulations.

This action in any event does not appear to be brought by the proper party, namely, Fabelle or her committee or guardian. Neither the brothers nor the mother appear to be proper parties. They have no legal interest.

The motion is denied an, for the reasons indicated, the Clerk is directed to enter judgment dismissing the action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted.

SO ORDERED.

Dated: June 10, 1974

INZER B. WYATT
United States District
Judge

U.S. District Court
Filed
June 19 1974
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY MARKOWITZ, on behalf of herself and her daughter ESTELLE POSNER and WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER

Plaintiffs : JUDGMENT

-against- : 74 Civil 1963 (IBW)

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services

Defendant

MICROFILM JUN 20 1974

The plaintiffs having moved the Court for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on June 10, 1974, having handed down its memorandum endorsement denying the said motion, and directing the Clerk to enter judgment dis-

missing the action, it is,

ORDERED, ADJUDGED and DECREED: That defendant ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, have judgment against the plaintiffs BETTY MARKOWITZ, on behalf of herself and her daughter, ESTELLE POSNER and WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER, dismissing the action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim which relief can be granted.

Dated: New York, N.Y.
June 19, 1974

/s/ Raymond F. Burghardt
CLERK

MICROFILM
JUN 20 1974

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the SEcond Circuit, held at the United States Courthouse in the City of New York, on the second day of December one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. ROBERT P. ANDERSON

HON. JAMES L. OAKES

Circuit Judges,

Betty Markowitz, Walter Markowitz, and Charles Markowitz, on behalf of themselves and their sister, Estelle Posner,

Plaintiffs-Appellants,

v. 74-1766

Abe Lavine, individually and as Commissioner of the New York State Department of Social Services,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjuged and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

Cal. No. 354

UNITED STATES COURT OF
APPEALS
SECOND CIRCUIT
FILED, DECEMBER 2, 1974
A. DANIEL FUSARO, CLERK

STATUTES INVOLVED

Federal Statutes and Regulations:

28 U.S.C. §1331

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of the interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub.L. 85-554, §1,72 Stat.415.

28 U.S.C. §1343(3)

Civil rights and elective franchise
The district courts shall have original jurisdiction of any

civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. §426

Entitlement to hospital insurance benefits - Individuals over 65 years

(a) Every individual who -

(1) has attained age 65, and
(2) is entitled to monthly insurance benefits under section 402 of this title or is a qualified railroad retirement beneficiary,

shall be entitled to hospital insurance benefits under part A of subchapter XVIII of this chapter for each month for which he meets the condition specified in subparagraph (B), beginning with the first month after June 1966 for which he meets the conditions specified in subparagraphs (A) and (B).

(b) Every individual who -



(1) has not attained age 65, and

(2)(A) is entitled to, and has for 24 consecutive calendar months been entitled to, (i)disability insurance benefits under section 423 of this title or (ii) child's insurance benefits under section 402(d) of this title by reason of a disability (as defined in section 423(d) of this title) or (III) widow's insurance benefits under section 402(e) of this title or widower's insurance benefits under section 402(f) of this title by reason of a disability (as defined in section 423(d) of this title), or (B) is, and has been for not less than 24 consecutive months a disabled qualified railroad retirement beneficiary, within the meaning of section 228s-3 of Title 45,

shall be entitled to hospital insurance benefits under part (A) of subchapter XVII of this chapter for each month beginning with the later of (I) July 1973 or (II) the twenty-fifth consecutive month of his entitlement or status as a qualified railroad retirement beneficiary described in paragraph (2), and ending with the month following the month in which notice of termination of such entitlement to benefits or status as a qualified railroad retirement beneficiary described in paragraph (2) is mailed to him, or if earlier, with the month before the month in which he attains age 65.

(c) For purposes of subsection (a) of this section -

(1) entitlement of an individual to hospital insurance benefits for a month shall consist of entitlement to have payment made under, and subject to the limitations in, part A of subchapter XVIII of this chapter on his behalf for inpatient hospital services, post-hospital extended care services, and post-hospital home health services (as such terms are defined in part C of subchapter XVIII of this chapter) furnished him in the United States (or outside the United States in the case of inpatient hospital services furnished under the conditions described in section 1395f(f) of this title) during such month; except that (A) no such payment may be made for post-hospital extended care services furnished before January 1967, and (B) no such payment may be made for post-hospital extended care services or post-hospital home health services unless the discharge from the hospital required to qualify such services for payment under part A of subchapter XVIII of this chapter occurred (i) after June 30, 1966, or on or after the first day of the month in which he attains age 65, which ever is later, or (ii) if he was entitled to hospital insurance benefits pursuant to subsection (b) of this section, at a time when he was so entitled; and

(2) an individual shall be deemed entitled to monthly insurance benefits under section 402 or 423 of this title, or to be a qualified railroad retirement beneficiary, for the month in

which he died if he would have been entitled to such benefits, or would have been a qualified railroad retirement beneficiary, for such month had he died in the next month.

(d) For purposes of this section the term "qualified railroad retirement beneficiary" means an individual whose name has been certified to the Secretary by the Railroad Retirement Board under section 228s-2 or 228s-3 of Title 45. An individual shall cease to be a qualified railroad retirement beneficiary at the close of the month preceding the month which is certified by the Railroad Retirement Board as the month in whcih he ceased to meet the requirements of section 228s-2 or 228s-3 of Title 45.

(e) Nothwithstanding the foregoing provisions of this section, every individual who -

(1) has not attained the age of 65;

(2) (A) is fully or currently insured (as such terms are defined in section 414 of this title) or would be fully or currently insured if his service as an employee (as defined in the Railroad Retirement Act of 1937) after December 31, 1936, were included in the term "employment" as defined in this chapter, or (B) is entitled to monthly insurance benefits under this subchapter or an annuity under the Railroad Retirement Act of 1937, or (C) is the spouse or dependent child (as defined in regulations)

of an individual who is fully or currently insured or would be fully or currently insured if his service as an employee (as defined in the Railroad Retirement Act of 1937) after December 31, 1936, were included in the term "employment" as defined in this chapter, or (D) is the spouse or dependent child (as defined in regulations) of an individual entitled to monthly insurance benefits under this subchapter or an annuity under the Railroad Retirement Act of 1937; and

(3) is medically determined to have chronic renal disease and who requires hemodialysis or renal transplantation for such disease;

shall be deemed to be disabled for purposes of coverage under parts A and B of Medicare subject to the deductible, premium, and copayment provisions of subchapter XVII of this chapter.

(f) Medicare eligiblity on the basis of chronic kidney failure shall begin with the third month after the month in which a course of renal dialysis is initiated and would end with the twelfth month after the month in which the person has a renal transplant or such course of dialysis is terminated.

(g) The Secretary is authorized to limit reimbursement under Medicare for kidney transplant and dialysis to kidney disease treatment centers which meet such requirements as he may by regulation prescribe: Provided, That such re-

quirements must include at least requirements for a minimal utilization rate for covered procedures and for a medical review board to screen the appropriateness of patients for the proposed treatment procedures.

(h)(1) For purposes of determining entitlement to hospital insurance benefits under subsection(b) of this section in the case of widows and widowers described in paragraph (2)(A)(iii) thereof -

(A) the term "age 60" in sections 402(e)(1)(B)(ii), 402(e)(5), 402(f)(6) of this title shall be deemed to read "age 65"; and

(B) the phrase "before she attained age 60" in the matter follow-ins subparagraph (F) of section 402(e)(1) of this title and the phrase "before he attained age 60" in the matter following subparagraph (G) of section 404(f)(1) of this title shall each be deemed to read "based on a disability".

(2) For purposes of determining entitlement to hospital insurance benefits under subsection (b) of this section in the case of an individual under age 65 who is entitled to benefits under section 402 of this title, and who was entitled to widow's insurance benefits or widower's insurance benefits based on disability for the month before the first month in which such individual was so entitled to old-age insurance benefits (but ceased to be entitled to such widow's or widower's insurance benefits upon becoming entitled to

such old-age insurance benefits), such individual shall be deemed to have continued to be entitled to such widow's insurance benefits or widower's insurance benefits for and after such first month.

(3) For purposes of determing entitlement to hospital insurance benefits under subsection (b) of this section any disabled widow age 50 or older who is entitled to mother's insurance benefits (and who would have been entitled to widow's insurance benefits by reason of disability if she had filed for such widow's benefits) shall, upon application, for such hospital insurance benefits be deemed to have filed for such widow's benefits and shall, upon furnishing proof of such disability prior to July 1, 1974, under such procedures as the Secretary may prescribe, be deemed to have been entitled to such widow's benefits as of the time she would have been entitled to such widow's benefits if she had filed a timely application therefor.

(i) For entitlement to hospital insurance benefits in the case of certain uninsured individuals, see section 426a of this title.
Aug. 14, 1935, c.531, Title II, §226, as added July 30, 1965, Pub.L.89-97, Title I, §101, 79 Stat.290, and amended Jan 2, 1968, Pub.L. 90-248, Title I, §129(c)(1), 81 Stat. 847; Oct. 30, 1972, Pub. L. 92-603, Title II, §§201(b), 299I, 86 Stat. 1371, 1463; July 6, 1973, Pub.L.93-58, §3, 87 Stat. 142; Dec. 31, 1973, Pub.L. 93-233, §18(f), 87 Stat. 969.

42 U.S.C. §1395(c) Description of Program

The insurance program for which entitlement is established by section 426 of this title provides basic protection against the costs of hospital and related posthospital services in accordance with this part for (1) individuals who are age 65 or over and are entitled to retirement benefits under subchapter II of this chapter or under the railroad retirement system and (2) individuals under age 75 who have been entitled for not less than 24 consecutive months to benefits under subchapter II of this chapter or under the railroad retirement system on the basis of a disability.

42 U.S.C. §1395(v) State agreements for coverage of eligible individuals who are receiving money payments under public assistance programs or are eligible for medical assistance; continuation of State agreements for coverage of certain individuals respecting supplemental security income

(a) The Secretary shall, at the request of a State made before January 1, 1970, enter into an agreement with such State pursuant to which all eligible individuals in either of the coverage groups described in subsection(b) of this section (as specified in the agreement) will be enrolled under the program established by this part.

(b) An agreement entered into with any State pursuant to sebsection (a) of this section may be applicable to either of the following coverage groups:

(1) individuals receiving money payment under the plan of such State approved under subchapter I or subchapter XVI of this chapter; or

(2) individuals receiving money payments under all of the plans of such State approved under subchapters I, X, XIV, and XVI of this chapter, and part A of subchapter IV ofthis chapter;

except as provided in subsection (g) of this section, there shall be excluded from any coverage group any indiviudal who is entitled to monthly insurance benefits under subchapter II of this chapter or who is entitled to receive an annuity or pension under the Railroad Retirement Act of 1937. Effective January 1, 1974, and subject to section 1396a(f) of this title, the Secretary shall, at the request of any State no eligible to participate in the State plan program established under subchapter XVI of this chapter, continue in effect the agreement entered into under this section with such St State subject to such modifications as the Secretary may by regulations provide to take account of the termination of any plans of such State approved under subchapters I,X,XIV, and XVI and the establishment of the supplemental security income program under subchapter XVI of this chapter.

(c) For purposes of this section, an individual shall be treated as an eligible individual only if he is an eligible individual (within the meaning of section 1395o of this title) on the date an agree-

ment covering him is entered into under subsection (a) of this section or he becomes an eligible individual (within the meaning of such section) at any time after such date; and he shall be treated as receiving money payments described in subsection (b) of this section if he receives such payment for the month in which the agreement is entered into or any month thereafter.

(d) In the case of any individual enrolled pursuant to this section -

(1) the monthly premium to be paid by the State shall be determined under section 1395r of this title (without any increase under subsection (c) thereof);

(2) his coverage period shall begin on whichever of the following is the latest:

(A) July 1, 1966;

(B) the first day of the third month following the month in which the State agreement is entered into;

(C) the first day of the first month in which he is both an eligible individual and a member of a coverage group sepcified in the agreement under this section; or

(D) such date as may be specified in the agreement; and

(3) his coverage period attributable to the agreement with the State under this section shall end on the last day of whichever of the following first occurs:

(A) the month in which he is determined by the State agency to have become ineligible both for money payments of a kind specified in the agreement and (if there is in effect a modification entered into under subsection (h) of this section) for medical assistance, or

(B) the month preceding the first month for which he becomes entitled to monthly benefits under subchapter II of this chapter or to an annuity or pension under the Railroad Retirement Act of 1937.

(e) Any individual whose coverage period attributable to the State agreement is terminated pursuant to subsection (d)(3) of this section shall be deemed for purposes of this part (including the continuation of his coverage period under this part) to have enrolled under section 1395p of this title in the initial general enrollment period provided by section 1395p(c) of this title.

(f) With respect to eligible individuals receiving money payments under the plan of a state approved under subchapter I,X,XIV, or XVI of this chapter, or Part A of subchapter IV of this chapter, or approved under subchapter XIX of this chapter, if the agreement entered into under this section so provides, the term "carrier" as defined in section 1395u(f) of this title also includes the State agency, specified in such agreement, which administers or supervises the administration of the plan of such State approved under subchapters I,XVI, or XIX of

this chapter. The agreement shall also contain such provisions as will facilitate the financial transactions of the State and the carrier with respect to deductions, coinsurance, and otherwise, and as will lead to economy and efficiency of operation, with respect to individuals receiving money payments under plans of the State approved under subchapters I, X, XIV, and XVI of this chapter, and part A of subchapter IV of this chapter, and individuals eligible to receive medical assistance under the plan of the State approved under subchapter XIX of this chapter.

(g)(1) The Secretary shall, at the request of a State made before January 1, 1970, enter into a modification of an agreement entered into with such State pursuant to subsection (a) of this section under which the second sentence of subsection (b) of this section shall not apply with respect to such agreement.

(2) In the case of any individual who would (but for this subsection) be excluded from the applicable coverage group described in subsection (b) of this section by the second sentence of such subsection -

(A) subsections (c) and (d)(2) of this section shall be applied as if such subsections referred to the modification under this subsection (in lieu of the agreement under subsection (a) of this section),

(B) subsection (d)(3)(B) of this section shall not apply so long as there is in effect a modification entered into by the State under this

subsection, and

(C) notwithstanding subsection (e) of this section, in the case of any termination described in such subsection, such individual may terminate his enrollment under this part by the filing of a notice, before the close of the third month which begins after the date of such termination, that he no longer wishes to participate in the insurance program established by this part (and in such a case, the termination of his coverage period under this part shall take effect as of the close of such third month).

(h)(1) The Secretary shall, at the request of a State made before January 1, 1970, enter into a modification of an agreement entered into with such State pursuant to subsection (a) of this section under which the coverage group described in subsection (b) of this section and specified in such agreement is broadened to include individuals who are eligible to receive medical assistance under the plan of such State approved under subchapter XIX of this chapter.

(2) For purposes of this section, an individual shall be treated as eligible to receive medical assistance under the plan of the State approved under subchapter XIX of this chapter if, for the month in which the modification is entered into under this subsection or for any month thereafter, he has been determined to be eligible to receive medical assistance under such plan. In the case of any individual who would (but for this subsection)

be excluded from the agreement, subsections (c) and (d)(2) of this section shall be applied as if they referred to the modification under this subsection (in lieu of the agreement under subsection (a) of this section), and subsection (d)(2)(C) of this section shall be applied by substituting "second month following the first month" for "first month".

Aug. 14, 1935, c. 531, Title XVIII, §1843, as added July 30, 1965, Pub. L. 89-97, Title I, §102(a), 79 Stat. 312, and amended Apr. 8, 1966, Publ. L. 89-384, §4(a), (b), 80 Stat. 105; Jan. 2, 1968, Pub.L. 90-248, Title II, §§222(a), (b), (e), 241(e), 81 Stat. 900, 901, 917; Dec. 31, 1973, Pub.L. 93-233, §18(1), 87 Stat. 970.

42 U.S.C. §1396a(a)(1) State plans for medical assistance - Contents

(a) A State plan for medical assistance must -

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

42 U.S.C. §1396a(a)(5)

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to adminsiter or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the

plan shall be made by the State of local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies adminstering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of this chapter if the State is not eligible to participate in the State plan program established under subchapter XVI of this chapter;

42 U.S.C. §1396a(a)(8)

(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979.

45 C.F.R. §249.11 Free choice of providers of medical services: State plan requirement

A State plan for medical assistance under title XIX of the Social Security Act must provide that any individual eligible for medical assistance under the plan may obtain the services available under theplan from any institution, agency, pharmacy, or practitioner, including an organization which provides such services or arranges for their availability on a prepayment basis, which is qualified to perform such services. This provision does not prohibit the State agency from establishing the fees which will be paid to providers for furnishing medical and remedial care available under the plan or from setting reasonable standards relating to the qualifications of providers of such care. In the case of Guam, Puerto Rico, and the Virgin Islands this provision applies only with respect to calendar quarters beginning after June 30, 1972. [35 F.R. 8732, June 5, 1970]

New York State Statutes and Regulations:

Social Services Law §62.5(d)

Responsibility for public assistance and care; exceptions

(d) When a person, either upon admission to a hospital, nursing home or intermediate care facility located in a public welfare district other than the district in which he was then residing, or while in such hospital, nursing home or intermediate care facility, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital, nursing home or intermediate care facility shall be responsible for providing such medical assistance for so long as such person is eligible therefor. If while such person is receiving care in such hospital, nursing home or intermediate care facility or when discharged therefrom, is in need of any other type of public assistance or care, the public welfare district, town or city from which the person was admitted to such hospital, nursing home or intermediate care facility shall be responsible for providing and paying for such public assistance or care as in the case of other persons requiring public assistance and care in its territory, and such responsibility shall continue thereafter in accordance with the provisions of this paragraph

and paragraph (b) if such person was receiving or should have been receiving public assistance or care from such public welfare district, town or city; such public welfare district, town or city shall likewise be responsible for the care, removal or burial of the body of any such person who shall die, and for the expense thereof. The provisions of this paragraph shall likewise be applicable to the care of an eligible person who, while temporarily absent from the public welfare district in which he then resided, was admitted to a hospital or nursing home in another public welfare district prior to the effective date hereof.

Social Services Law §363

Declaration of objects

Medical assistance for needy persons is hereby declared to be a matter of public concern and a necessity in promoting the public health and welfare and for promoting the state's goal of making available to everyone, regardless of race, age, national origin or economic standing, uniform, high-quality medical care. In furtherance of such goal, a comprehensive program of medical assistance for needy persons is hereby established to operate in a manner which will assure a uniform high standard of medical assistance throughout the state. In carrying out this program every effort shall be made to promote maximum public awareness of the availability of, and procedure for ob-

taining, such assistance, and to facilitate the application for, and the provision of such medical assistance. Added L.1966, c. 256, §3, eff. April 30, 1966.

Social Services Law §366-a(4)

Applications for assistance; investigations; reconsideration; appeals and hearings

Where an application is not acted upon within thirty days after its filing or is denied or the assistance is deemed inadequate by the applicant, the latter may appeal to the department which, upon receipt of the appeal, shall review the case and shall give the applicant making the appeal on opportunity for a fair hearing thereon. The department may also, on its own motion, review any decision made or any case in which a decision has not been made within the time specified.

18 N.Y.C.R.R. §358.3(c)

Informing applicants and recipients of right to fair hearing [Additional statutory authority: Social Services Law, §34] Every applicant and recipient shall be informed in writing at the time of any action affecting his receipt of assistance or services:

That he may be represented by legal counsel, or by a relative, friend, or other spokesman, or he may represent himself

18 N.Y.C.R.R. §358.5(a)

How request for a fair hearing is made, withdrawn or abandoned.

Any clear written or oral communication to the department by or on behalf of an applicant or recipient requesting review of a social services official's decision, action or failure to act shall constitute a request for a fair hearing if made within 60 days after the action or failure to act complained of.

N.Y.C.R.R. §358.(b)

How request for a fair hearing is made, withdrawn or abandoned.

The freedom to make such a request must not be limited or interfered with in any way, and emphasis must be on helping the appellant to submit and process his request and in preparing his case, if needed.

N.Y.C.R.R. §358.5(b)

Who may be present at hearing, authorization of representative.

An individual or organization, other than an attorney, representing an appellant shall have an appropriate written authorization, unless the condition of the appellant makes it impracticable for him to execute such authorization.

INDEX

Page

APPENDIX

Respondent's Fair Hearing
Decision dated December 17, 1973..A31

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of	
ESTELLE POSNER	DECISION AFTER
from determinations by the Oneida County and New York City Departments of Social Services	FAIR HEARING

A fair hearing was held at Two World Trade Center, New York, New York, on November 1, 1973, before Michael Cimorelli, Hearing Officer, at which the appellant's representatives and representatives of the New York City Department appeared. The appeal is from determinations by the Oneida County Department of Social Services (hereinafter called the County) and the New York City Department of Social Services (hereinafter called the city) denying an application for medical assistance authorization. An opportunity to be heard having been accorded interested parties and the evidence having been taken

and due deliberation having been had, it is hereby found:

(1) Appellant was placed in the Masonic Home in Utica, New York, by her husband in August, 1971.

(2) On March 7, 1973, an application for medical assistance for the appellant was made to the County by her brothers Walter and Charles Markowitz.

(3) The County denied the application on April 18, 1973, on the ground that appellant is living in a home where her physical and medical needs are being provided for.

(4) Appellant was a resident of the City before entering the home in August, 1971. Appellant's only legally responsible relative is her husband, who is a resident of the City and not a party to this hearing.

(5) No application for medical assistance was made to the City on behalf of the appellant.

(6) A medical report on the appellant dated August 31, 1973, states that the appellant, aged 56, has shown progressive deterioration and is both mentally and physically incompetent to conduct any matters in her own behalf.

(7) The request for the fair hearing was made by appellant's brothers in her name.

No application for medical assistance was made to the City by or on behalf of the appellant. Therefore, as to the City, there is no issue to be decided.

Section 101 of the Social Services Law reads as follows:

> "1. The spouse or parent of a recipient of public assistance or care of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

"2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official."

Section 358.2 of the Regulations of the State Department of Social Services provides in part that a fair hearing is the procedure by which an applicant for assistance and care or services may appeal to the State Commissioner of Social Services from certain decisions or actions of a social services official and have a hearing thereon. The parties to the fair hearing shall be the appellant and the social services official whose decision or action is being received.

Pursuant to the aforecited section of

the Social Services Law, appellant's only legally responsible relative is her husband. Any action or proceeding relative to meeting the needs and care of appellant must be taken by him. Appellant's husband has not requested a fair hearing to review the County's determination and although given notice of the date, time and place of this hearing, refuses to be a party to this proceeding. The request for a hearing was made by appellant's brothers in her name. They are not legally responsible for her care and may not request a fair hearing in her name. They, themselves, are not entitled to a hearing as they are not applicants for or recipients of assistance and care. Accordingly, the State Commissioner of Social Services may not rule on the merits of this appeal.

It should be noted at this point that Section 360.9(b) of the aforecited

Regulations provides in part that full and proper use shall be made of existing public and private medical and health services and facilities for obtaining medical and health care, services and supplies. Such care, services and supplies include those available from or through, amongst others, fraternal benefits. Appellant's full needs are being met in a home maintained by a fraternal organization. Accordingly, the County was correct in its determination to deny appellant's application for medical assistance.

Additionally, Section 62.5(d) of the Social Services Law provides in pertinent part as follows:

> "(d) When a person, either upon admission to a hospital or nursing home located in a public welfare district other than the district in which he was then residing, or while in such hospital or nursing home, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital or

nursing home shall be responsible for providing such medical assistance for so long as such person is eligible therefor."

Appellant was a resident of the City when she entered the home in Utica in August, 1971. Pursuant to this Section of the law, the County would not be responsible for providing medical assistance to appellant in the event she were to become eligible for such assistance.

DECISION: There is no issue to be decided as to the New York City Department of Social Services. The State Commissioner of Social Services has no jurisdiction to rule on the merits of the appeal as to the Oneida County Department of Social Services.

DATED: Albany, New York
DEC 17, 1973

/s/ Abe Lavine
Abe Lavine
COMMISSIONER

BY /s/ Carmen Shang
Carmen Shang
ASSISTANT COMMISSIONER

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MAR 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1089

OCTOBER TERM, 1974

BETTY MARKOWITZ, WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER,

Petitioners,

against

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7410

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reason Why Certiorari Should Be Denied	3
Conclusion	5

TABLE OF CASES

Edelman v. *Jordan*, 415 U.S. 651 (1974)	5
Hagans v. *Lavine*, 415 U.S. 528, 537-538 (1974)	4
Lindsay v. *Wyman*, 372 F. Supp. 1360, 1369-1370 (S.D.N.Y. 1974)	4, 5
Renegotiation Board v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20-21 (1974)	4
Rothstein v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972); cert. den. 411 U.S. 921 (1973)	5
Scheuer v. *Rhoades*, 416 U.S. 232, 237-238 (1974)	5
Sosna v. *State of Iowa*, —— U.S. —— 42 L. Ed. 2d 532	4
Younger v. *Harris*, 401 U.S. 37 (1971)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1089

BETTY MARKOWITZ, WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and their sister ESTELLE POSNER,

Petitioners,

against

ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

On June 10, 1974, the United States District Court for the Southern District of New York (WYATT, J.) denied petitioner's motion for a preliminary injunction directing the Commissioner of the New York State Department of Social Services to provide her "with medical assistance payments as provided by law," and dismissed the action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted. A copy of the unreported Memorandum Opinion appears in the Appendix to the Petition for Writ of Certiorari. On December 2, 1974 the United States Court of

Appeals for the Second Circuit affirmed the order and judgment of the District Court. A copy of the Circuit Court's order appears in the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Questions Presented

Does a controversy over medical assistance eligibility as defined by a state's social service law present a federal question?

Is there a basis for the exercise of a court's equitable jurisdiction where a plaintiff has an adequate remedy at law and is not threatened by irreparable injury if denied equitable relief?

Is a suit which in effect seeks a money judgment against a state barred by the Eleventh Amendment?

Statement of the Case

Petitioner and her husband had been residents of New York City. Petitioner is mentally and physically incompetent. In August of 1971 the husband placed her in the Masonic Home at Utica, New York which is in Oneida County. On March 7, 1973, her brothers made on her behalf an application for medical assistance to the Oneida County Department of Social Services. On April 18, 1973 the County denied the application on the ground that she was living in a home which was providing for her physical and medical needs (A. 32-33).*

* The numerals refer to the page numbers of petitioner's Appendix and Supplemental Appendix.

Thereafter, the brothers made a request in her name for a hearing which was held on November 1, 1973. On December 17, 1973, the Commissioner issued a decision. He noted that petitioner's needs were being taken care of at the Home (A. 36); and also that since she was a resident of New York City when she entered the Home in Oneida County, the City rather than the County would be responsible for providing her with medical assistance if she became eligible for it (A. 36-37). He ruled that New York's Social Services Law § 62(5)(d) requires that her application for medical assistance must be made in New York City rather than to Oneida County.

The District Court noted that this was a state administrative controversy over medical assistance; that the State has not denied any federally protected rights; that the jurisdictional amount was not present; that no substantial constitutional claim was advanced; and that neither the brothers nor the mother were a proper party to the action (A. 3-4).

Reason Why Certiorari Should Be Denied

Petitioner sought an injunction directing the Commissioner of Social Services of New York to provide her "with medical assistance payments as provided by law." The Masonic Home in New York where she was residing was providing her with medical assistance. The Commissioner noted that petitioner's needs were being taken care of at the Home (A. 36).

The application for medical assistance was made to Oneida County instead of New York City, where petitioner had been a resident before entering the Home. As the Commissioner observed, under New York's Social Services Law § 62(5)(d) the City rather than the County would be responsible for providing her with medical assistance if she became eligible for it (A. 36-37). The importance of

local responsibility for public assistance in New York has been recognized by a statutory three-judge court in *Lindsay* v. *Wyman*, 372 F. Supp. 1360, 1369-1370 (S.D.N.Y. 1974).

As the District Judge noted one fair hearing had been held, and another could be requested in New York City. Moreover, if there is error in a denial of an application for medical assistance an Article 78 proceeding in the state courts is available to correct it (A. 3). Indeed petitioner, in fact, initiated such proceeding. Also, as stated, it appeared that her needs were being taken care of at the Home. Petitioner had an adequate remedy at law, and she was not threatened by irreparable injury if denied equitable relief. Therefore, there was no basis for the exercise of the District Court's equitable jurisdiction. See *Sosna* v. *State of Iowa*, —— U.S.——, 42 L. Ed. 2d 532; *Younger* v. *Harris*, 401 U.S. 37 (1971). *Cf. Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20-21 (1974).

Petitioner claimed that she had been deprived of alleged constitutional rights to medical treatment, to travel and to be with her family. The allegations did not amount to a substantial constitutional claim such as is required to support federal jurisdiction. *Hagans* v. *Lavine*, 415 U.S. 528, 537-538 (1974). The deprivations were alleged to have resulted from the issuance by the Commissioner of a decision after a fair hearing denying her medical assistance. See petitioner's Supplemental Appendix. As the District Court noted this was a state administrative controversy over medical assistance. Whether petitioner is eligible for medical assistance, and if she is, which public welfare district is responsible for providing it is an issue of state law (New York's Social Services Law §§ 366, 62[5][d]) and not a federal question.

The relief requested was an order directing the Commissioner to provide her with medical assistance payments

and damages. As *Lindsay* v. *Wyman, supra* points out the payment is a local responsibility. Obviously this was not a liability which she sought to impose upon him personally. As stated above, the Commissioner merely issued a decision after a hearing as to the particular local responsibility as required by law. In effect, she was asking for a money judgment against the State and the suit was barred by the Eleventh Amendment. *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Scheuer* v. *Rhoades*, 416 U.S. 232-238 (1974); *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972); cert. den. 411 U.S. 921 (1973).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, March 21, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel